Church and State, 1948

On March 8, 1948 the Supreme Court of the United States decided the case of *McCollum v. Board of Education*[1] holding that a voluntary, part time program of religious education in the public schools of Champaign, Illinois, was violative of the First Amendment, "made applicable to the states by the Fourteenth Amendment."[2] This decision followed only a year after that in the case of *Everson v. Board of Education*[3] in which a New Jersey law authorizing the use of tax funds to reimburse parents of public and parochial school children for their expenditures for transporting their offspring to school via public common carriers was upheld against the assertion that it was violative of the First and Fourteenth Amendments. Both opinions were written by Mr. Justice Black. In the *Everson* case there were four dissents: Justices Jackson, Rutledge, Frankfurter and Burton. In the *McCollum* case the only dissenter was Mr. Justice Reed. In both cases the dissent seems to the writer to present the better argument. In both cases the majority is out of step with the prevailing sentiment and mores of the time.

Before the adoption of the Fourteenth Amendment it was generally conceded that the First Amendment applied only to acts by the national government.[4] It expressly states that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press . . ." Such questions as are presented by the *McCollum* and *Everson* cases would clearly have been matters within the exclusive jurisdiction of the state courts before 1868. The Supreme Court of the United States, speaking through Mr. Justice Miller in the *Slaughterhouse Cases*, expressly renounced the concept that the Bill of Rights of the federal Constitution was an enumeration of the privileges and immunities of citizens of the United States and refused to commit the Court to the role of ex post facto censor of state legislation.[5] There were four dissents.

The first encroachments on the doctrine of federal non-intervention under the Fourteenth Amendment in matters covered by the First Amendment arose in cases involving freedom of speech and of the press. In *Gitlow v. New York*, Mr. Justice Sanford assumed that freedom of speech and of the press were among the

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[1] 68 Sup. Ct. 461 (1948).

[2] *Id.* at 464.

[3] 330 U. S. 1 (1947).

[4] Barron v. Baltimore, 7 Pet. 242 (U. S. 1833).

[5] 16 Wall. 36 (U.S. 1872); *cf.* Twining v. New Jersey, 211 U.S. 78 (1908), Mr. Justice Harlan dissenting.

fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.[6] He made no allusion to the First Amendment in his opinion. Justices Holmes and Brandeis dissented. Only six years later Mr. Chief Justice Hughes added fuel to the flame by invalidating the Minnesota newspaper injunction act as a violation of "the liberty of the press guaranteed by the Fourteenth Amendment."[7] Justices Butler, Van Devanter, McReynolds and Sutherland dissented.

There was no mention of the First Amendment in the decisions of the Supreme Court dealing with state legislative and administrative action until the advent of the Jehovah's Witnesses cases. In the first of these, the *Gobitis* case, the court, speaking through Mr. Justice Frankfurter, upheld a regulation of a public school board requiring pupils to salute the flag, regardless of their religious beliefs.[8] Mr. Justice Stone, in dissent said, "The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth."[9] Here is a suggestion of the linking of the First and Fourteenth Amendments as limitations upon state power which came soon after.

In fact, the *Gobitis* case remained the law for only three years when the same question as to the flag salute was presented to the court again. This time an opposite conclusion was reached and the state legislation was held invalid.[10] Mr. Justice Jackson, who delivered the opinion of the court, made the new doctrine as to the status of the First Amendment quite clear. He said, "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard . . . It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."[11] There were dissents by Justices Frankfurter, Roberts and Reed.

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[6] 268 U.S. 652 (1925).

[7] Near v. Minnesota, 283 U.S. 697, 723 (1931).

[8] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[9] *Id.* at 601.

[10] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[11] *Id.* at 639.

The *Barnette* case was decided at the same term of court as *Murdock v. Pennsylvania*[12] in which the court invalidated an ordinance of the City of Jeannette imposing a license tax upon solicitors as applied to Jehovah's Witnesses. The opinion of the court was delivered by Mr. Justice Douglas, who said, "The First Amendment, which the Fourteenth makes applicable to the states"[13] guarantees certain freedoms which cannot be abridged through the taxing power any more than through the police power. "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."[14]

Up to 1947, in the handling of cases involving freedom of religious groups, the Supreme Court was following a liberal and popular pattern. Of course there were exceptions, such as the *Gobitis* case, and there were cases in which the states and their municipalities were permitted to exercise reasonable regulation of religious groups and their activities under the police power, such as *Cox v. New Hampshire.*[15] But in the *Everson* case a somewhat different issue arose. The problem had been faced once before in *Cochran v. Louisiana*[16] in which case the court approved the use of tax funds for the purchase of textbooks for use in parochial schools. Even earlier the court had held that parents might, in discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school met the secular educational requirements imposed by the state.[17] In this case the Oregon statute requiring all children of school age to attend *public* school was held unconstitutional under the Fourteenth Amendment.

In the words of Mr. Justice Rutledge's dissenting opinion in the *Everson* case "For just as *Cochran v. Board of Education*, . . . has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third.[18] Thus with time, the most

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[12] 319 U.S. 105 (1943).

[13] *Id.* at 108.

[14] *Id.* at 113. For other recent cases involving limitations on freedom of religion by state laws see Marsh v. Alabama, 326 U.S. 501 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Martin v. Struthers, 319 U.S. 141 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

[15] 312 U.S. 569 (1941).

[16] 281 U.S. 370 (1930).

[17] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[18] This reference to obliqueness results from the fact that the First Amendment issue was not raised by the briefs in the *Cochran* case.

solid freedom gives way before continuing corrosive decisions . . .[19] Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualification for office followed later . . . Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function."[20] Mr. Justice Rutledge found in the New Jersey practice a direct and palpable violation of the principle of separation of church and state enjoined by the First Amendment. Transportation was inseparable from other educational costs. The purpose of the state's contribution was to defray the cost of conveying the pupil to the place where he was to receive not only secular, but also, and primarily, religious instruction. He did not deny the value or necessity of religious training. But he did deny that it could be aided or promoted in any way from the public treasury. Justices Franfurter, Jackson, and Burton joined in this dissent.

Mr. Justice Black in presenting the opinion of the court has a lame argument indeed when compared with those advanced by Justices Jackson and Rutledge in the dissent: He points out: (1) the power of the Court to strike down state statutes, on the ground that the purpose for which tax raised funds were to be expended was not a public one, must be exercised with extreme caution; (2) it is too late to argue (in view of the *Cochran* case) that legislation to reimburse needy parents, or all parents for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitch hiking" serves no public purpose; (3) while the state may not contribute tax funds to the support of any institution which teaches the tenets and faith of any church, it may not deny the benefits of its public welfare legislation to any person because of his faith or lack of it. The tax involved was likened to the service rendered by police or fire departments which must be available to all alike. As far as Mr. Justice Black's argument is germane to the matter dealt with in the opinion, it clearly points toward a conclusion opposite from that which he reached on behalf of the majority of the court. He concluded his presentation with the following paragraph: "The First Amendment has erected a wall

[19] 330 U.S. at 29.
[20] *Id.* at 44.

between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[21] Such a conclusion is a patent *non sequitur*. It is not surprising that four justices dissented.

The *Everson* case laid the foundation for the *McCollum* case, which was decided a year later. It also stimulated a widespread public reaction, expressed by religious and secular publications and by leaders of public opinion in all parts of the country. There were even political repercussions, especially in the South. Mr. Justice Black, as the spokesman for the majority, came in for some rather severe personal criticism. By his opinion, even though it followed the *Cochran* case, he had made a serious breach in the strict separation of church and state so dear to the hearts of the voters in the "Bible Belt," and *ipso facto*, to the politicians who depended upon those voters. One possible explanation of the decision in the *McCollum* case is that it seemed expedient to Mr. Justice Black and to other members of the court to make amends for the *Everson* case by "cracking down" on voluntary religious education in the public schools. It is hard to find adequate justification for the conclusion reached in any other way. Neither in the opinion of the court nor in the concurring opinions of Mr. Justice Frankfurter and Mr. Justice Jackson is there any satisfactory explanation for the result reached.

Mr. Justice Black, in the opinion of the court in the *McCollum* case, based the invalidation of the Champaign School District program upon "the use of tax supported property for religious instruction and the close cooperation between the school authorities and the religious council (including Catholic, Protestant, and Jew) in promoting religious education."[22] This arrangement, he thought, fell "squarely under the ban of the First Amendment (made applicable to the states by the Fourteenth)"[23] as interpreted by the court in the *Everson* case. The references which he made to that case are to the dicta, such as the final paragraph, composed wholly of platitudes not determinative of the issues involved. If the *McCollum* case really had been decided on the basis of the *Everson* case it would necessarily have gone the other way. Certainly consistent persons cannot uphold taxes for religious purposes one day and condemn them the next. Furthermore, of the two, the *Everson* case, logically should have been found to have violated the First and Fourteenth Amendments because the tax raised funds were used in that case to benefit only one religious group, while in the

McCollum case the tax raised funds were used for benefit of all religious groups (Catholic, Protestant, and Jew).

Mr. Justice Frankfurter in his concurring opinion was also troubled about the intimate connection in the Champaign system between religious and secular instruction. He presented in his opinion a scholarly and illuminating survey of the history of religion in education in this country. He admitted that the concept of separation of church and state in American education is of comparatively recent development. Enough of the earlier idea of combined effort in this field remained in 1875 to make the need for separation worthy of comment by President Grant. Not until 1876 did Congress begin to make non-sectarian public schools a condition of the admission of new states to the union.

The increased tempo of modern life has made the home and church less effective instrumentalities for religious education than they once were. Parents who desire for their children the religious education which they themselves had, turn to the church. The church in turn points out that the time of the children is monopolized by the school and asks for them to be "released" from a part of this obligation for religious education. The parents approve. Plans similar to that established in Champaign have been set up in many localities in all parts of the country. By the *McCollum* case all of these projects must be abandoned or revised to avoid the bases for their condemnation.

One way in which the ban may be avoided is by using churches rather than school buildings in which to hold the classes. This will be less efficient, but the change is not an impossible one. In some cities this already is being done. In the second place, the secular school authorities must deny any official knowledge of or participation in the plan. This should be easier if the classes in religious education are not held on the school premises. Finally, the classes must be held entirely outside of the regular school hours. Of course there is nothing to prevent the changing of these hours, if state law permits, in order to allow time for religious instruction. It goes without saying that attendance on such classes should never be compulsory and no public funds should be expended either for salaries of teachers, or for supplies and equipment, or for rental of space. The superintendent of schools may not have any hand (officially) in the selection or retention of the teachers.

Mr. Justice Frankfurter in his concurring opinion suggested that there may be ways in which the rigor of the case may be mitigated by changes in local schemes. Mr. Justice Jackson, in a separate concurring opinion, expressed considerable doubt as to whether the facts of the case established jurisdiction in the court. He distinguished it from both the *Barnette* case and the *Everson* case (in

which he dissented). He said, "In this case . . . any cost of this plan to the taxpayers is incalculable and negligible . . . I think it is doubtful whether the taxpayer in this case has shown any substanial property injury."[24] He clearly recognized the difficulty, if not impossibilty, of removing all traces of religion from the secular courses of the curriculum. He deplored the broad and sweeping form of the decree requested by the petitioner and apparently approved by the court. He concluded his opinion by saying, "It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions."[25]

Mr. Justice Reed was alone in his dissent, although, from the concurring opinions of Mr. Justice Frankfurter and Mr. Justice Jackson, it is clear that they were not completely convinced of the desirability of the court's decision. In the dissent, the fact that even at the University of Virginia, in 1824, religious sects were invited to establish schools for instruction in their religion was cited as evidence of the practice of that day. The difference between the statements of Jefferson on the separation of church and state, and the actual practice of the university he founded was considerable. As Mr. Justice Reed pointed out, "A rule of law should not be drawn from a figure of speech"[26] such as Jefferson had uttered. The dissent further suggested that churches all receive aid from the government in the form of freedom from taxation. The practices of the federal government are pointed to as a similar type of "aid" to religion as that proscribed by the court: an official chaplain for Congress, chaplains for the armed forces, training for the ministry under the G I Bill of Rights, compulsory chapel services at the Military and Naval Academies. He said, "I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend religious classes, churches are unconstitutionally aided . . . the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion . . . The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state."[27]

The dissenting opinion concludes with an argument for affirmance which makes a strong appeal to those who believe in state

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[24] 68 Sup. Ct. at 476.
[25] *Id.* at 478.
[26] *Id.* at 482.
[27] *Id.* at 486-487.

sovereignty and control over education. "A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population . . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people."[28] The court is reaping the whirlwind from the wind sown by Chief Justice Hughes in *Near v. Minnesota.* Perhaps it would have been better if the court never had extended the due process clause of the Fourteenth Amendment to include the guarantees of the First Amendment, which were clearly intended to be limitations only upon Congress. A reversion to the rule of *Barron v. Baltimore, The Slaughterhouse Cases,* and *Twining v. New Jersey* would relieve the court from the onerous duty of serving as a board of censors for the states and probably would prevent it from making such bad and inconsistent law on the subject of church and state as is found in the *Everson* and *McCollum* cases. If the court is entering upon this new line of decision because it is not satisfied with the way the state courts are dealing with the bills of rights of the state constitutions, a better solution would seem to be awakening citizens to demand better administration of their own state laws rather than reducing the administration of public law to a dead level of federal control.

Harvey Walker, Sr.

[28] *Id.* at 487.